

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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|--------------------------------|---|---------------------------|
| THE PAUL REVERE LIFE INSURANCE |) | |
| COMPANY, |) | NO. CV-04-0456 |
| Plaintiff, |) | |
| |) | |
| v. MARCUS DEWOOD, |) | ORDER RE: MOTIONS PENDING |
| |) | July 27, 2005; DENYING |
| Defendant |) | DEFENDANT'S MOTION FOR |
| |) | SUMMARY JUDGMENT RE: |
| and, |) | ATTORNEY FEES; DENYING |
| |) | PLAINTIFF'S CROSS-MOTION |
| MARCUS A. DEWOOD, M.D., A |) | FOR SUMMARY JUDGMENT; |
| SINGLE MAN, |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | [CONSOLIDATED CASE] |
| |) | |
| UNUM PROVIDENT CORPORATION, |) | |
| D/B/A THE PAUL REVERE |) | |
| INSURANCE COMPANY, |) | |
| Third Party Defendant. |) | |

BEFORE THE COURT are seven motions filed by both Marcus DeWood and Unum Provident/Paul Revere ["UNUM"]¹. On July 27, 2005, the Court held a hearing, heard argument, and delivered an oral ruling on the pending motions. This Order is entered to memorialize and supplement the Court's oral ruling. For the reasons stated on the record on July 27, 2005, **IT IS HEREBY ORDERED:**

¹ The Court will refer to the insurer herein as Unum. All references to Unum are intended to encompass both Unum Provident Corporation and Paul Revere Insurance Company.

1 1. DeWood's Motion for Appointment of Special Discovery Master
2 (Ct. Rec. 30) is **DENIED**.

3 2. DeWood's Motion to Compel Discovery (Ct. Rec. 40) is **GRANTED**
4 **IN PART** and **DENIED IN PART**.

5 a. The party who prevails on a motion to compel is
6 entitled to his or her expenses, including reasonable attorney
7 fees, unless the losing party was substantially justified in
8 making or opposing the motion. Fed.R.Civ.P. 37(a)(4). The Court
9 will not award attorney fees this time as this is the first time
10 before the Court on a discovery dispute and conduct of both
11 parties necessitated the hearing of the motion. The Court
12 cautions that future motions of this nature will likely involve
13 the award of attorney fees.

14 b. **WITHIN 14 DAYS OF THIS ORDER**, the parties are ordered
15 to meet and confer to discuss the amendment and supplementation of
16 the challenged Requests for Production in light of the Court's
17 general comments made on the record and herein. If the parties
18 are unable to resolve these issues, the Court is willing to hear a
19 motion to compel on an expedited basis. Any such motion must list
20 of the items in dispute and set forth *argument* as to the grounds
21 for compelling discovery in each instance. The non-movant should
22 not be required to speculate as to what theories support the need
23 to compel discovery.

24 c. The Court's ruling does not change Unum's obligation
25 to supplement the disclosures to the extent they had previously
26 indicated they would do so.

27 d. The objection to Request for Production No. 1 is
28 sustained. Unum shall provide DeWood with a list of bad faith

1 lawsuits filed against them (and Paul Revere) in the states of
2 Washington and California in the past ten years.

3 e. The following are discoverable subject only to
4 appropriate claims of privilege, which if made, must be made known
5 to DeWood.

6 i. All data including but not limited to records,
7 statements, documents, letters, electronic communications,
8 correspondence, memos, and notes, pertaining to any aspect of the
9 disability claim of Marcus DeWood are discoverable.

10 ii. Employment manuals, memos supplementing that manual,
11 company memos, electronic or other documentation of conversations
12 regarding how claims would be handled and claim adjustment
13 activities during the pendency of the plaintiff's claim are
14 discoverable.

15 iii. All information regarding claims adjustment policies
16 and practices *in effect* during the pendency of Dr. DeWood's claim,
17 even if dated prior to the filing of his claim, is discoverable.

18 iv. The Court reserves ruling on the issue of discovery
19 beyond the recent national settlement agreement involving Unum and
20 federal and state regulators.

21 vii. All documents and communications involving
22 directives regarding any type of rebate, reward, bonus, or
23 incentive program that UNUM had with its employees or consultants
24 from 1994 to date are discoverable.

25 viii. The furnishing party shall bear the cost of
26 responding to a discovery request, unless otherwise agreed upon by
27 the parties or ordered by the Court. Disclosure may be made in
28 electronic format so long as meaningful access to the data is

1 possible.

2 7. A privilege log shall be utilized to inform the
3 opposing party of any data claimed to be protected by the
4 attorney-client privilege.

5 3. DeWood's Motion for Protective Order (Ct. Rec. 43) is
6 **RESERVED**. The parties agree as to the necessity of a protective
7 order. However, they disagree on the terms. The Court finds the
8 party who opposes the confidential designation of a disclosure
9 shall have the burden of filing any motion to challenge such
10 designation. The burden of persuasion, however, shall remain on
11 the party seeking the data's protection.

12 The parties have **SEVEN DAYS** from the date of this Order to meet
13 and confer to agree upon the terms of a stipulated protective
14 order. Should the parties not agree, each party shall simply file
15 their proposed order within **THREE DAYS** of the meeting. The parties
16 shall also email their respective proposed orders to the Court at
17 sukoorders@waed.uscourts.gov. The Court will thereafter rule upon
18 the Motion for Protective Order and enter an order it finds
19 appropriate.

20 4. DeWood's Motion to Strike (Ct. Rec. 49) the Defendants'
21 motion for partial summary judgment for lack of a Statement of
22 Facts is **DENIED** as **MOOT**.

23 5. DeWood's Motion to Strike (Ct. Rec. 70) Defendants'
24 pleadings as untimely is **DENIED**.

25 6. Paul Revere's Motion for Partial Summary Judgment Re: Common
26 Law Attorney's Fees (Ct. Rec. 46) is **DENIED** and DeWood's Cross-
27 Motion for Summary Judgment re: Attorney Fees (Ct. Rec. 53) is
28 **DENIED**.

1 Paul Revere's motion requests the entry of partial summary
2 judgment regarding DeWood's claim for attorney fees in connection
3 with his claims for breach of contract, breach of the covenant of
4 good faith, and bad faith. Paul Revere's motion is premised upon
5 its position that "[t]he only basis through which DeWood could
6 hope to recover fees in connection with [these claims] is through
7 the *Olympic Steamship* doctrine."² *Paul Revere's Motion for*
8 *Summary Judgment* at 4. Paul Revere argues it is entitled to
9 partial summary judgment because the *Olympic Steamship* exception
10 cannot apply in this case because the attorney fees sought were
11 incurred without the necessity of filing suit. Otherwise stated,
12 Paul Revere asserts the filing of a lawsuit is a precondition to
13 the application of the *Olympic Steamship* exception. Paul Revere
14 secondly argues *Olympic Steamship* cannot apply in this instance
15 because it applies only to coverage disputes.

16 Though the Court noted in its oral ruling that *Olympic Steamship*
17 does not expressly state the filing of suit is a condition
18 precedent, the Court makes no finding on the applicability of the
19 *Olympic Steamship* exception to the facts of this case. Whether such
20 a finding is made will, in part, abide the development of the facts
21 in this case. Moreover, the Court need not rule on this issue
22 because the Court rejects the underlying premise of Paul Revere's
23 motion that the *Olympic Steamship* doctrine is DeWood's "only basis"

24
25 ² Washington follows the American rule of attorneys' fees which
26 generally is that each litigant must absorb their own litigation
27 expenses. The *Olympic Steamship* doctrine, announced in *Olympic*
28 *Steamship Co. v. Centennial Ins. Co.*, 117 Wash.2d 37, 52-53, 811 P.2d
673 (1991), is an exception to this general rule which permits attorneys
fees where an insurer compels its insured to assume the burden of legal
action in order to obtain the full benefit of his insurance contract.
Leingang v. Pierce County Med. Bureau, Inc., 131 Wash.2d 133, 143, 930
P.2d 288 (1997).

1 for the recovery of attorneys' fees on these claims. As noted by
2 Paul Revere in the opening pages of its motion, under the American
3 rule, a litigant is entitled to recover attorneys' fees if
4 authorized by statute, contract, or a *recognized ground in equity*.
5 *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wash.2d 133, 143,
6 930 P.2d 288 (1997); *Dayton v. Farmers Ins. Group*, 124 Wash.2d 277,
7 280, 876 P.2d 896 (1994) (holding that a court has power to award
8 attorney fees when authorized by "contract, statute, or recognized
9 ground of equity") (citing *State ex rel. Macri v. City of Bremerton*,
10 8 Wash.2d 93, 113-14, 111 P.2d 612 (1941)). While *Olympic Steamship*
11 is one recognized equitable ground, Washington cases have
12 specifically recognized at least four other equitable grounds for
13 the award of attorney fees: (1) common or trust fund preservation,
14 *Grein v. Cavano*, 61 Wash.2d 498, 505, 379 P.2d 209 (1963); (2)
15 actions by a third person subjecting the party to litigation, *Wells*
16 *v. Aetna Ins. Co.*, 60 Wash.2d 880, 882-83, 376 P.2d 644 (1962); (3)
17 dissolving wrongfully issued temporary injunctions or restraining
18 orders, *Cecil v. Dominy*, 69 Wash.2d 289, 291-94, 418 P.2d 233
19 (1966); and (3) *bad faith or misconduct of a party*, *Miotke v. City*
20 *of Spokane*, 101 Wash.2d 307, 338, 678 P.2d 803 (1984).

21 Whether the *Olympic Steamship* exception applies or does not
22 apply, Paul Revere is not entitled to partial summary judgment on
23 the issue of attorney fees, because other equitable grounds - such
24 as bad faith or misconduct - which are issues of fact in this case -
25 present a possible basis for recovery. Because the possibility of
26 recovery cannot be eliminated at this stage, Paul Revere's motion
27 is denied. Finally, DeWood's cross-motion for summary judgment is
28 premature as there has been no determination of liability on the

1 underlying claims.

2 **IT IS SO ORDERED.**

3 The District Court Executive is directed to enter this order
4 and provide copies to counsel.

5 DATED this __29th__ day of July, 2005.

6 *s/ Lonny R. Suko*

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8 LONNY R. SUKO
9 UNITED STATES DISTRICT JUDGE
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